



## **Case Summary**

Appellant-Defendant Daryl W. Barton (“Barton”) appeals the denial of his motion to withdraw his plea of guilty to Dealing in Cocaine, as a Class B felony.<sup>1</sup> We affirm.

## **Issue**

Barton presents one issue for review: whether the trial court abused its discretion by refusing to allow him to withdraw his guilty plea.

## **Facts and Procedural History**

On October 4, 2006, the State charged Barton with Dealing in Cocaine, as a Class A felony, and Possession of Cocaine, as a Class C felony.<sup>2</sup> On August 22, 2007, Barton pleaded guilty to Dealing in Cocaine, as a Class B felony, and the State agreed to forego prosecution of the possession charge. The charge to which Barton pleaded guilty provided: “Daryl Barton on or about October 2<sup>nd</sup>, 2006 knowingly possessed with intent to deliver, a controlled substance that is cocaine.” (Tr. 11.) Pursuant to the terms of the plea agreement, Barton’s sentence was capped at fifteen years.

On September 7, 2007, Barton filed a verified motion for withdrawal of his guilty plea. On September 25, 2007, the trial court conducted a hearing regarding the motion and denied the same. On October 16, 2007, Barton was sentenced to fifteen years imprisonment. He now appeals.

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<sup>1</sup> Ind. Code § 35-48-4-1.

<sup>2</sup> Ind. Code § 35-48-4-6.

## Discussion and Decision

Barton belatedly proclaimed his innocence<sup>3</sup> and also claimed that his former counsel did not adequately represent him. Barton's verified motion stated that he "had time to reflect on the plea of guilty ... believes that it is unjust for him to proceed with his plea of guilty as he does not believe himself guilty of the charges and ... believes that he has a defense to the charges listed in the charging information[.]" (App. 43.) At the hearing on the motion for withdrawal, Barton asserted, by present counsel, that his former attorney led him to believe that a suppression hearing would be conducted and that he had a viable defense. Alternatively, he claimed that his former counsel failed to advise him of available defenses. Barton testified "I was just misled about the plea and everything that was going on in my case. . . . We never did get to a suppression hearing. I kept on asking him about a suppression. . . . He filed it. He just never got around to it." (Tr. 22.)

Indiana Code Section 35-35-1-4(b) sets forth the applicable standard when a defendant pleads guilty pursuant to an agreement with the State and then requests to withdraw the plea before sentencing:

After entry of a plea of guilty ..., but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea ... for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in

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<sup>3</sup> Had Barton proclaimed his innocence at the same time he pleaded guilty, the trial court would not have been able to accept the plea. A trial court may not accept the entry of a guilty plea when it is accompanied by a defendant's contemporaneous expression of innocence. Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983); Harshman v. State, 232 Ind. 618, 621, 115 N.E.2d 501, 502 (1953). The purpose of the Harshman-Ross rule is to increase the reliability of guilty pleas and promote respect for the court system. Carter v. State, 739 N.E.2d 126, 129 (Ind. 2000). However, an admission of guilt that is later retracted may nonetheless be reliable. Id. at 130.

writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea ... whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Our appellate courts have interpreted this statute to require a trial court to grant such a request only when the defendant proves that withdrawal of the plea “is necessary to correct a manifest injustice.” Turner v. State, 843 N.E.2d 937, 940 (Ind. Ct. App. 2006) (quoting Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998)). The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Id. Except under such polar circumstances, disposition of the petition is at the discretion of the trial court. Id.

On appeal, the trial court’s ruling on a motion to withdraw a guilty plea is presumed to be correct. Id. at 941. Therefore, one who appeals an adverse decision on a motion to withdraw must prove the trial court abused its discretion. Id. We will not disturb the court’s ruling where it was based on conflicting evidence. Id.

Barton’s hearing testimony primarily concerned his dissatisfaction with his prior counsel. To the extent that he sought to establish ineffectiveness of counsel and obtain post-conviction relief, the efforts were premature because he had not yet been sentenced. Indiana Code Section 35-35-1-4(c), applicable to the withdrawal of guilty pleas after sentencing, provides that one of the grounds for withdrawal is that the convicted person was denied the

effective assistance of counsel but also provides that the motion to vacate the judgment and withdraw the plea shall be treated by the trial court as a petition for post-conviction relief.<sup>4</sup>

However, advice of counsel may be relevant to the voluntariness of a defendant's decision to plead guilty. Here, despite Barton's assertion that his attorney misled him, the record reveals that Barton was present at the guilty plea hearing when his attorney advised the court "we've reached a tentative agreement, subject to the Court's approval that he would at this time forego the Motion to Suppress." (Tr. 4.) Barton did not then protest, but rather affirmatively indicated to the trial court that he understood he was giving up the right to present evidence on his own behalf.

The jury trial was then imminent, having been set for the following week. By that time, over ten months had elapsed between the time the charges were filed and the offer of the guilty plea. Presumably, Barton knew during that time whether or not he had possessed cocaine with intent to deliver it. Rather than proclaim his innocence to the court or to his attorney so that a different course could be pursued, Barton advised the trial court that he was pleading guilty of his own free will. He stated that he understood the charge against him, the terms of the plea agreement, and the rights waived.

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<sup>4</sup> In Segura v. State, 749 N.E.2d 496, 507 (Ind. 2001), an appeal from the denial of post-conviction relief, our Supreme Court categorized two main types of ineffectiveness claims subsequent to a guilty plea: (1) failure to advise the defendant on an issue that impairs or overlooks a defense; and (2) incorrect advice as to penal consequences. In the case of claims related to a defense, "it must be shown that there is a reasonable probability that a more favorable result would have obtained in a competently run trial." Id.

The record does not support the contention that withdrawal of Barton's guilty plea was necessary to correct a manifest injustice. As such, the trial court was not required to grant Barton's petition. Nor has Barton established an abuse of the trial court's discretion.

Affirmed.

RILEY, J., and BRADFORD, J., concur.